LEKCHUMANAN SUPPIAH & ANOR v. RAVI RAJU

COURT OF APPEAL, PUTRAJAYA
LIM YEE LAN JCA
VARGHESE GEORGE JCA
IDRUS HARUN JCA
[CIVIL APPEAL NO: B-02(NCVC)(W)-1906-11-2014]
16 DECEMBER 2016

CONTRACT: *Agreement – Loan agreement – Friendly loan agreement – Security – Land – Parties executed sale and purchase agreement simultaneously with loan agreement – Default in repayment of loan – Lender transferred borrowers' land to himself – Whether transfer of land obtained by fraud or deception – Whether friendly loan and sale and purchase agreements could exist side by side – Whether have equal force – Whether lender was holding land as constructive trustee for borrowers – Whether lender bona fide purchaser of land*

LAND LAW: *Transfer – Validity – Parties executed friendly loan agreement simultaneously with sale and purchase agreement – Security – Land – Default in repayment – Lender transferred borrowers' land to himself – Whether transfer of land obtained by fraud or deception – Whether transfer valid – Whether mere holding of issue document of title to land by lender vests him with legally recognised interest in land – Whether lender has right to transfer borrowers' land to himself on grounds land was intended to be security for loan*

The appellants, the registered owners of a piece of land, and the respondent executed a friendly loan agreement ('the FLA') in the sum of RM60,000. As security for the FLA, the respondent was entitled to transfer the land to himself in the event of default to repay the loan. Simultaneously with the FLA, the parties also executed (i) a sale and purchase agreement ('the SPA') in respect of the land at the price of RM100,000; (ii) a document known as acknowledgement receipt which stated a total sum of RM100,000 had been paid by the respondent and received by the appellants; and (iii) a blank Form 14A ('the MOT'). The respondent proceeded to lodge a caveat on the said land. In his statutory declaration, the respondent averred that he intended to purchase the land and he had paid in part the amount of RM60,000. The appellants only made four payments of RM3,000 each towards the repayment of the friendly loan. The respondent issued notices of demand but there were no reference whatsoever made to the SPA nor was there any assertion that the balance of the purchase price for the land had been paid by the respondent and/or that the land would be proceeded to be transferred to the respondent. The MOT was presented to the land office by the respondent and the transfer of the land in favour of the respondent was registered. The appellants commenced an action at the High Court against the respondent alleging, *inter alia*, that the transfer of the land to the respondent was obtained by fraud or deception. The appellants sought declarations that (i) the FLA and/or the SPA were illegal, null and void *ab initio*; (ii) the

A respondent was holding the land as constructive trustee for the appellants; and (iii) the respondent was not a *bona fide* purchaser of the land. The respondent wished to retain ownership of the land while also, through its counterclaim against the appellant, sought an order to be paid a further sum of RM88,000 which allegedly constituted the balance or unpaid portion of
B the friendly loan. The trial judge dismissed both the appellants' claim and the respondent's counterclaim on grounds, *inter alia*, that (i) the MOT was voluntarily executed by the appellants; (ii) there was no evidence that the appellants handed over the issue document title ('IDT') of the land to the respondent under undue influence or duress; (iii) the respondent was not
C undertaking an unlicensed moneylending transaction; (iv) there was no collateral contract between the parties; (v) the acknowledgement receipt proved the loan had been increased to RM100,000 and by this document, the whole sum had been admitted by the appellants; and (vi) the appellants had breached the FLA by not repaying the loan sum. Hence, the present appeal.

D **Held (allowing appeal)**
Per Varghese George JCA delivering the judgment of the court:

(1) There were serious flaws in the approach taken by the trial judge in deciding the issues that arose in this suit. The trial judge should have, at the outset, dealt with and determined which of the two documents,
E namely the FLA or the SPA, reflected the dominant or prevalent contract and was binding upon the parties. There could not exist two conflicting positions in respect of the respondent's contractual interest in the same subject which was the land. The obligations of the appellants under the terms in the FLA were *in personam* in nature; the land offered
F to the respondent was to form only a guarantee for the repayment of the friendly loan. On the other hand, if the SPA was to be treated as an independent and separate contract, it creates *in rem* rights over the land outright in favour of the respondent which was divesting the appellants' title and interest in the land completely, subject to the respondent
G satisfying the terms of the SPA. (paras 23, 27, 28 & 29)

(2) The trial judge had misdirected himself when His Lordship proceeded on the basis that the FLA and SPA existed side by side with equal force. The FLA was the primary contract between the parties. The nature of the contract entered into was essentially a loan transaction where the
H respondent was the lender and the appellants were the borrower. The FLA itself did not require that an MOT should be signed or the IDT be handed over by the appellants. Therefore, the deposit of the IDT of the land by the appellants with the respondent was more of an additional comfort to enable the respondent to merely have a temporary lien over
I the IDT and not over the land *per se*, pending repayment of the loan by the appellants. The execution of the SPA and the MOT together with the

deposit of the IDT with the respondent were merely ancillary. The respondent was not entitled to use those documents to register separately and independently transfer the land to himself. (paras 31, 32, 35 & 37)

(3) The mere holding of the IDT by a lender does not vest the holder any legally recognised interest in the land, much less, any right to deal with the land or to transfer it to himself on the grounds that it was intended to be a security for the loan. Only a secured creditor with a registered charge in respect of a specific land had priority in the proceeds from the sale of the land upon default of the loan. However, the lender remained always an unsecured creditor. The deposit of the IDT by the appellants with the respondent only created an equitable interest which, to be enforced or realised, required the respondent to register with the land authorities a lien-holders' caveat under the provision of the National Land Code over the land. The respondent have to obtain a judgment as to the amount owed by the appellants before securing an order for sale from the courts to enforce or recover monies under the lien-holders' caveat. (paras 39 & 48)

(4) The trial judge was clearly in error when His Lordship held that the acknowledgement receipt was sufficient proof that the loan had been subsequently agreed upon to be increased from RM60,000 to RM100,000. On the face of the document itself, the alleged RM100,000 only related to the SPA and the purchase consideration. There was no reference to the friendly loan in that document in any manner whatsoever. (para 49)

(5) This was a case that warranted appellate intervention to right a wrong that had been occasioned to the appellants. Apart from reverting the land in effect to the appellants, the respondent's unpaid balance of the friendly loan amounting to RM48,000 is recovered from the appellants. (para 51)

Bahasa Malaysia *Headnotes*

Perayu-perayu, pemilik berdaftar sebidang tanah, memeterai satu perjanjian pinjaman mesra ('FLA') berjumlah RM60,000. Sebagai cagaran FLA, responden berhak memindah milik tanah tersebut kepada dirinya jika perayu-perayu ingkar membayar semula pinjaman. Pada masa yang sama, pihak-pihak turut memeterai (i) satu perjanjian jual beli ('PJB') tanah pada harga RM100,000; (ii) dokumen yang dikenali sebagai pengakuan penerimaan yang menyatakan responden telah membayar RM100,000 dan jumlah ini diterima oleh perayu-perayu; dan (iii) Borang 14A yang kosong ('MOT'). Responden seterusnya mendaftarkan kaveat pada tanah tersebut. Dalam akuan berkanunnya, responden mendalihkan bahawa dia berniat membeli tanah tersebut dan dia telah membayar sebahagian bayaran berjumlah RM60,000. Perayu-perayu hanya membuat empat bayaran yang setiap satu berjumlah RM3,000 sebagai bayaran semula pinjaman mesra. Responden mengeluarkan notis tuntutan tanpa apa-apa rujukan pada PJB

A mahupun dakwaan bahawa baki harga belian tanah telah dibayar oleh responden dan/atau tanah akan dipindah milik kepada responden. Responden mengemukakan MOT di pejabat tanah dan pindah milik kepada responden didaftarkan. Perayu-perayu memulakan satu tindakan di Mahkamah Tinggi terhadap responden atas dakwaan, antara lain, pindah
B milik tanah kepada responden diperoleh melalui penipuan atau perdayaan. Perayu-perayu memohon pengisytiharan bahawa (i) FLA dan/atau PJB tidak sah dan terbatal *ab initio*; (ii) responden memegang tanah sebagai pemegang amanah konstruktif bagi pihak perayu-perayu; dan (iii) responden bukan pembeli *bona fide* tanah tersebut. Responden berhajat mengekalkan milikan
C tanah dan pada masa yang sama, melalui tuntutan balas terhadap perayu, memohon perintah untuk dibayar RM88,000 yang dikatakan baki atau bahagian pinjaman mesra yang tidak berbayar. Hakim bicara menolak tuntutan perayu-perayu dan tuntutan balas responden atas alasan, antara lain, (i) perayu-perayu memeterai MOT secara sukarela; (ii) tiada keterangan bahawa penyerahan IDT tanah oleh perayu-perayu kepada responden dibuat
D atas pengaruh tidak wajar atau ugutan; (iii) responden tidak menjalankan transaksi pinjaman wang tidak berlesen; (iv) tiada kontrak kolateral antara pihak-pihak; (v) pengakuan penerimaan membuktikan pinjaman dinaikkan menjadi RM100,000 dan melalui dokumen ini, keseluruhan jumlah tersebut diperakui oleh perayu-perayu; dan (vi) perayu-perayu telah melanggar FLW
E dengan tidak membayar jumlah pinjaman. Maka timbul rayuan ini.

Diputuskan (membenarkan rayuan)
Oleh Varghese George HMR menyampaikan penghakiman mahkamah:

(1) Terdapat kecacatan serius dalam pendekatan yang diambil oleh hakim
F bicara dalam memutuskan isu-isu berbangkit dalam guaman ini. Hakim bicara sepatutnya, dari awal lagi, menangani dan memutuskan mana satu, antara kedua-dua dokumen tersebut, iaitu FLA atau PJB, yang mencerminkan kontrak umum dan dominan yang mengikat pihak-pihak. Dua kedudukan bercanggah tidak boleh wujud dalam kepentingan
G kontraktual responden berdasarkan perkara pokok yang sama iaitu tanah tersebut. Kewajipan perayu-perayu bawah terma-terma dalam FLA bersifat *in personam*; tanah yang ditawarkan kepada responden hanya membentuk jaminan bagi bayaran semula pinjaman mesra. Sebaliknya, jika PJB dianggap sebagai kontrak bebas dan berasingan, hak *in rem* yang terbentuk atas tanah terus berpihak pada responden iaitu melucutkan
H sepenuhnya hak milik dan kepentingan perayu-perayu, tertakluk pada pemenuhan terma PJB oleh responden.

(2) Hakim bicara tersalah arah apabila beliau meneruskan perbicaraan atas alasan FLA dan PJB wujud seiring dengan kekuatan yang sama. FLA
I adalah kontrak utama antara pihak-pihak. Sifat kontrak yang dimeterai, pada asasnya, ialah transaksi pinjaman iaitu responden sebagai pemberi pinjaman manakala perayu-perayu sebagai peminjam. FLA dengan sendirinya tidak mengkehendaki MOT ditandatangani atau agar IDT diserahkan oleh perayu-perayu. Oleh itu, penyerahan IDT tanah oleh

perayu-perayu kepada responden hanya sekadar penenang tambahan untuk membolehkan responden mempunyai lien sementara terhadap IDT dan bukan terhadap tanah itu sendiri, sementara menunggu bayaran semula pinjaman oleh perayu-perayu. Pelaksanaan PJB dan MOT bersekali dengan penyerahan IDT kepada responden hanya bersifat sampingan. Responden tidak berhak menggunakan dokumen-dokumen tersebut untuk mendaftar pindah milik tanah tersebut kepada dirinya secara bebas atau berasingan.

(3) Pegangan IDT semata-mata oleh pemberi pinjam tidak memberi si pemegang kepentingan yang diperakui undang-undang apatah lagi hak untuk menjalankan urusan atas tanah atau memindah miliknya kepada diri sendiri atas alasan tanah adalah cagaran pinjaman. Hanya pemiutang bercagar dengan cagaran tanah berdaftar mempunyai kepentingan dalam hasil jualan tanah jika berlaku keingkaran membayar pinjaman. Walau bagaimanapun, peminjam kekal pemiutang tidak bercagar. Pengemukaan IDT oleh perayu-perayu kepada responden hanya membentuk kepentingan berekuiti yang, untuk dikuatkuasakan atau direalisasikan, memerlukan responden mendaftarkan kaveat pemegang lien atas tanah tersebut pada pihak berkuasa tanah bawah Kanun Tanah Negara. Responden perlu mendapatkan penghakiman bagi jumlah terhutang oleh perayu-perayu sebelum mendapatkan perintah mahkamah untuk menguatkuasakan atau mendapatkan semula wang bawah kaveat pemegang lien.

(4) Hakim bicara jelas terkhilaf apabila beliau memutuskan pengakuan penerimaan adalah bukti cukup bahawa pinjaman dipersetujui untuk dinaikkan daripada RM60,000 menjadi RM100,000. Pada dasar dokumen itu sendiri, jumlah yang didakwa iaitu RM100,000 hanya berkaitan PJB dan balasan belian. Tiada rujukan pada pinjaman mesra dalam dokumen tersebut melalui apa-apa bentuk.

(5) Kes ini mewajarkan campur tangan rayuan untuk membetulkan ketidakadilan yang berlaku pada perayu-perayu. Selain mengembalikan tanah tersebut secara efektif kepada perayu-perayu, baki pinjaman mesra yang terhutang oleh perayu-perayu berjumlah RM48,000 dipulangkan kepada responden.

Case(s) referred to:

China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 FC ***(refd)***

Consolidated Credit Company Sdn Bhd v. Gladys Loh & Ors and Another Case [2014] 6 CLJ 308 HC ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Mercantile Bank Ltd v. The Official Assignee of the Property of How Han Teh [1969] 1 LNS 106 HC ***(refd)***

Zaharah A Kadir v. Ramunia Bauxite Pte Ltd & Anor [2011] 1 LNS 1015 CA ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 24, 75
National Land Code, ss. 241, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 281(2), 330, 331
Rules of Court 2012, O. 42

Other source(s) referred to:
Yong Chiu Mei, *The Concept and Nature of Liens and the Legal Effect of Imperfect Liens under the Peninsular Malaysian Land Law*, The Law Review 2007, p 579

For the appellants - Govin T Durai; M/s Govin T Durai & Co
For the respondent - V Kumaran, Mahindarjit Singh & M Dhiyaulhaq Arifin; M/s Huang Khairun Kumar & Assoc

[Editor's note: Appeal from High Court, Shah Alam; Suit No: 22NCVC-89-02-2014 (overruled).]

Reported by Najib Tamby

JUDGMENT

Varghese George JCA:

[1] We had on 22 January 2016 unanimously allowed the appeal to the following extent.

> The transfer of land to Respondent is illegal, null and void for breach of the provisions of the National Land Code (NLC) *vis a vis* the mandatory provisions requiring the Respondent to register a Lien Holders Caveat (LHC) before enforcing the security created by the holding of a document of title to land in accordance with the relevant NLC provisions. Nevertheless we uphold the valid parts of the friendly Loan Agreement and on the evidence of a loan of RM60,000.00 having been given by Respondent to Appellants, and after accounting for 4 repayments of RM3,000.00 each, the Appellants are to pay the Respondent the balance of the loan amounting to RM48,000.00 together with interest @ 5% pa on RM48,000.00 from the date of Judgment in the High Court (24.09.2014) until full settlement.
>
> Accordingly we set aside the order of the High Court and grant in its place the following orders:
>
> (1) OIT in terms of prayers (e) to (k) of the Amended Statement of Claim.
>
> (2) Further order that Appellants to pay Respondent RM48,000.00 together with interest @ 5% pa from date of Judgment in the High Court (24.09.2014) until full settlement.
>
> (3) That there be no order as to costs.
>
> (4) Deposit be refunded to Appellant.

[2] The prayers (e) to (k) of the amended statement of claim which were allowed by us were in the following terms:

e. Satu Pengistiraan bahawa pendaftaran pindahmilik hartanah tersebut pada 2/08/2013 melalui No. Perserahan 3415/2013 dari Plaintif-Plaintif kepada Defendan adalah tidak sah dan menyalahi undang-undang.

f. Satu ~~Pengistiraan~~ Perintah bahawa pendaftaran pindahmilik hartanah di Lot 1372, No. Hakmilik 4787, Bandar Banting, Daerah Kuala Langat, Negeri Selangor ke atas nama Defendan pada 2/08/2013 melalui No. Perserahan 3415/2013 dibatalkan sepenuhnya.

(g) Satu Deklarasi bahawa pendaftaran pemilikan ke atas nama Defendan melalui No. Perserahan 3415/2013 adalah tidak sah, batal dari awal (*void an initio*) dan menyalahi undang-undang atau bertentangan dengan undang-undang.

(h) Satu ~~Deklarasi~~ Perintah bahawa pengeluaran Suratan Geran Hakmilik ke atas nama Defendan pada 2/08/2013 adalah tidak sah dan dibatalkan.

(j) Pentadbiran Tanah/ Pendaftar Hakmilik Daerah Kuala Langat diperintahkan untuk mendaftar nama LEKCHUMANAN A/L SUPPIAH dan PARAMESWARY A/P ~~K. RANGGAIYAH~~ K.RANGAYA sebagai pemilik baru untuk ~~Lot 13331, PM 5152, Mukim Tanjung Duabelas, Daerah Kuala Langat, Negeri Selangor~~ Lot 1372, No. Hakmilik 4787, Bandar Banting, Daerah Kuala Langat, Negeri Selangor tersebut sebaik sahaja perintah bermeterai ini disampaiserah kepada Pendaftar Hakmilik Daerah Kuala Lumpur.

(j) Pentadbir Tanah/Pendaftar Hakmilik Daerah Kuala Selangor diperintahkan untuk keluarkan satu suratan Hakmilik baru di atas nama LEKCHUMANAN A/L SUPPIAH dan PARAMESWARY A/P ~~K. RANGGAIYAH~~ K. RANGAYA sebagai pemilik berdaftar terbaru untuk harta dan ~~Lot 13331, PM5152, Mukim Tanjung Duabelas, Daerah Kuala Langat, Negeri Selangor~~ Lot 1372, No. Hakmilik 4787, Bandar Banting, Daerah Kuala Langat, Negeri Selangor sebaik sahaja perintah bermeterai disampaiserah kepada Pendaftar Hakmilik Daerah Kuala Langat.

(k) Plaintif dibenarkan untuk mohon lain-lain perintah sampingan untuk memberi efek dan kesan untuk mencapai tujuan membawa tindakan ini.

Background

[3] The appellants (who were the plaintiffs in the suit) were the registered owners of the land held under Hakmilik No. 4787 for Lot 1372, Bandar Banting, Daerah Kuala Langat, Negeri Selangor (the land) prior to 2 August 2013.

[4] On 10 May 2012 amidst certain interrelated events that took place, the parties executed several documents of contractual significance. The documents were prepared by a solicitor acting for the respondent, namely, one Puan Nor Zairawathy Abd Razak (SP1) of Tetuan Zaira & Co., Kuala Langat.

[5] One of the documents entered into was 'An Agreement' (P1) evidencing the fact that the respondent had extended to the appellants a friendly loan in the sum of RM60,000 and as a security for that loan the respondent was entitled to transfer the land to himself in the event of default to repay the loan. (This document is referred hereinafter as the FLA).

[6] The terms of the FLA relevant for our consideration are set out below:

> AND WHEREAS in consideration of the **amount borrowed** by the Second Party [Appellant] from the First Party [Respondent], it is hereby mutually agreed by both parties in the Agreement that **as the security for the said friendly loan,** if there is **default to repay** the said friendly loan to the First Party within stipulated period, the Second Party hereby allows the property held under GERAN MUKIM 4787, LOT NO. 1373, SEKSYEN 1, BANDAR BANTING, DAERAH KUALA LANGAT, NEGERI SELANGOR DARUL EHSAN (hereinafter referred to as **"the said Property") to be transferred to the First Party.**
>
> WHEREAS IT IS AGREED as follows:
>
> 1. The First Party hereby advance to the Second Party the sum of RINGGIT MALAYSIA SIXTY THOUSANG **(RM60,000.00)** only as **friendly loan** (the receipt whereof the Second Party hereby acknowledge).
> 2. The said friendly loan shall be repayable by the Second Party to the First Party within Twelve (12) Months from the date of this Agreement.
> 3. In furtherance of Clause 2 above, **if in the event the Second Party fail to repay the said friendly loan** upon demand, **such friendly loan shall be recoverable** by the First Party **through legal action and any costs** expenses including solicitors costs on solicitor clients basis and damages sustained by the First Party shall be borne by the Borrower(s) **and the property will automatically be transferred to the First Party.**
>
> (emphasis added)

[7] Simultaneously with the FLA, the parties also executed on the same day a 'Sale and Purchase Agreement' (P2) (hereinafter referred as SPA) in respect of the land. The appellants were named as the vendors and the respondent as the purchaser thereto.

(i) It was provided for in THE SECOND SCHEDULE of the SPA that the purchase price for the land was RM100,000 and a sum of RM60,000 had been paid as deposit by the respondent.

(ii) The balance of the purchase price amounting to RM40,000 was to be effected before the completion date, which, by s. 3.02(b) of the SPA, was stated to be 12 months from the date of the execution of the SPA.

[8] The appellants also on 10 May 2012 signed a document titled 'ACKNOWLEDGEMENT RECEIPT' (P12). The relevant part of that document read as follows:

> We [Appellant] ...do hereby acknowledged receipt the below cheques from [Respondent]...being payment of the GERAN MUKIM 4787, LOT NO. 1373 of the Sale and Purchase of the property held under *[sic]*:
>
> (a) Hong Leong Bank Berhad's cheque No. 034268 amounting RM25,300.00 payable to LEKCHUMANAN A/L SUPPIAH (NRIC NO. 650511-10-6013);
>
> (b) Hong Leong Bank Berhad's cheque No. 034267 amounting RM30,000.00 payable to PARAMESWARY A/P K. RANGAYA (NRIC NO. 660422-10-6002); and
>
> (c) Cash sum of RM44,700.00 only.

Based on this document, it would appear that a total sum of RM100,000 had been paid by the respondent and received by the appellants also on 10 May 2012.

[9] The appellants also on the same day signed a Borang 14A (Borang Pindahmilik Tanah) (P3), which, according to the appellants, was in blank (that is, with the insertions required therein not filled in). The Borang 14A (MOT) was then handed over to SP1. (It must be pointed out here that the MOT was subsequently presented for registration with the Pejabat Tanah and was dated 5 June 2013.) All the signatures affixed thereto were attested to by SP1.

[10] Further, the appellants had also on the same 10 May 2012 handed over to SP1 the issue document of title to the land (IDT).

[11] On 11 May 2012 the respondent proceeded to lodge a caveat (subsequently registered on 17 May 2012) against the land. In the AKUAN BERKANUN the respondent averred that he intended to purchase the land and he had paid 'sebahagian sebanyak RM60,000'. It needs to be highlighted here that neither was the SPA mentioned nor was the full purchase price that had supposedly been agreed to, declared in that document.

[12] It was not in dispute that the appellants had only made four payments of RM3,000 each towards repayment of the friendly loan sum (RM60,000).

[13] The respondent through his same solicitors issued two notices of demand to the appellants, namely on 29 March 2013 and 26 April 2013. There were no accounts set out therein but those notices merely stated that the appellants had '... enggan membuat bayaran ansuran bulanan ...' and the appellants were to within 14 and 7 days respectively from those dates '… menyelesaikan bayaran ansuran yang tertunggak …', failing which 'tindakan undang-undang yang tegas' would be taken against the appellants.

[14] It was significant to note that in both the aforesaid letters of demand there was no reference whatsoever made to the SPA nor was there any assertion by the respondent that the balance of purchase price for the land, in any event, had been paid by the respondent and/or that the land would be proceeded to be transferred to the respondent.

[15] The MOT was on 2 August 2013 presented to the land office by solicitors for the respondent and the transfer of the land in favour of the respondent was registered by the relevant authorities *vide* Perserahan No.: 3415-2013.

[16] The appellants commenced this suit against the respondent on 26 February 2014 *inter alia* alleging that the transfer of the land to the respondent was obtained by fraud or by deception perpetrated on the appellants (para. 13 of the amended statement of claim).

[17] Amongst the relief sought by the appellants in the suit (para. 16(a) to (d) of statement of claim) were for declarations that the FLA and/or the SPA were illegal, null and void *ab initio*, that the respondent was holding the land as constructive trustee for the appellants and that the respondent was not a *bona fide* purchaser of the land.

[18] The respondent in his defence and counterclaim, filed on 28 April 2014, in the main contended that both the FLA and SPA were valid and binding on the appellants since they were drawn up by solicitors and had been voluntarily executed by the appellants. The appellants, it was averred there further, had voluntarily handed over the IDT to the respondent's solicitors and the transfer of the land to the respondent should be upheld.

[19] The respondent nevertheless admitted that four payments in the sum of RM3,000 each had been received from the appellants towards repayment of the loan sum, which the respondent maintained was RM100,000 (not RM60,000 as shown in the FLA). Accordingly, by way of the counterclaim the respondent sought judgment to be entered against the appellants for a sum of RM88,000 which sum, according to the respondent, constituted the alleged balance or unpaid portion of the friendly loan. In other words, the respondent wanted to retain ownership of the land while also seeking an order to be paid a further sum of RM88,000 by the appellants.

The Trial And Judgment Of The High Court

[20] After having heard the parties and considered their submissions the learned judge dismissed both the appellants' claim as well as the respondent's counterclaim.

[21] The principal reasons why the appellants' claim was dismissed as could be drawn from the alasan penghakiman mahkamah, were the following:

(a) Prior negotiations had taken place between the parties and agreement had been reached on the terms relating to the transactions before the FLA and SPA were drawn up and subsequently executed by the parties. A

(b) The FLA and SPA had been entered into voluntarily by the appellants. Similarly the MOT too had been executed by the appellants voluntarily and, since the signing of a MOT was also a term previously agreed, the court did not accept that the MOT had been signed in blank as contended by the appellant. B

(c) There was no evidence that the handing over of the IDT of the land by the appellants to the respondent's solicitors was done under undue influence or duress and therefore the contention of the appellants that there was fraud or misrepresentation could not be accepted. The IDT was in the circumstances also handed over voluntarily by the appellants. C

(d) There was no evidence that the respondent in this instance was undertaking an unlicensed moneylending transaction. The respondent was a transport contractor cum driver, and not a moneylender under the Moneylenders Act 1951. D

(e) The FLA did not contain any term from which it could be implied that there was an interest charged on the friendly loan sum involved as contended by the appellants. The only term as to the appellants' obligation to repay was that the loan sum should be settled in 12 months and it was open whether the repayments were to be in instalments or in a single lump sum within that specified time. E

(f) There was in any event no evidence to support the claim that there existed a collateral contract between the parties whereby interest at the rate of 5% per month would be charged on the loan sum of RM60,000 (amounting to RM3,000 per month) as contended by the appellants. F

(g) The 'acknowledgment receipt' (P12) proved that the loan sum had been increased to RM100,000 (as claimed by the respondent) and by this document, the whole of the sum had been 'admitted' as received by the appellants. G

(h) The appellants had breached the FLA by not repaying the loan sum even despite the notices of demand of 29 March 2012 and 26 April 2013 (P8, P9). The respondent was entitled to and did therefore validly transfer the land to himself for valuable consideration. H

[22] With respect to the respondent's counterclaim the learned judge interestingly observed as follows:

> [38] Dalam perkara tuntutan balas defendan bagi baki jumlah wang pinjaman RM80,000.00 [sic], Mahkamah dapati defendan gagal membuktikan terdapat sebarang kerugian ke atas defendan di bawah pinjaman tersebut setelah hartanah terlibat di bawah perjanjian dilakukan pindahmilik kepada defendan. Defendan tidak boleh I

A mendapat faedah berganda yang tidak wajar (unjust enrichment) di bawah perjanjian tersebut setelah mengambil pilihan dengan memindah milik hartanah yang menjamin kepada pinjaman tersebut. Keterangan plaintif mengatakan nilai pasaran semasa hartanah tersebut sekarang lebih kurang RM150,000.00. Tuntutan balas oleh defendan dengan itu ditolak.

B

Our Deliberation And Decision

[23] It was obvious to us from the outset that there were serious flaws in the approach taken by the learned judge in deciding upon the issues that arose in this suit. What was at the centre of the controversy between the parties C was the transfer of the land to the respondent. The land featured within the terms of the two contractual documents executed by the same parties simultaneously on the same day, namely the FLA and the SPA.

[24] On the one hand the FLA evidenced that the land was being offered by the appellants as a 'security' for the repayment of the friendly loan of D RM60,000 taken by the appellants from the respondent. On the other hand however, the terms of the SPA by all appearances was akin to a standalone contract for the disposal by the appellant and acquisition by the respondent of the same land for purportedly a purchase consideration of RM100,000.

[25] It was also evident that the respondent was asserting their right under E the SPA in wanting to preserve the transfer of the land already effected into the respondent's name, while at the same time, specifically by their counterclaim, was also attempting to recover what was claimed to be the unpaid portion of the friendly loan (which principal sum according to the respondent now was RM100,000 and not RM60,000 as shown in the FLA).

F

[26] In our view, in the context of the patent contradictions that emerged from the two executed documents (the FLA, the SPA), the first determination that should have been embarked upon by the learned judge was to decide which of the two documents should prevail, to the exclusion of the other, as the effective contract between the parties. Alternatively, if G both were still sustainable in law (since the learned judge was of the view that both were executed voluntarily by the parties), the question that ought to follow should have been which among the two documents represented or formed the primary contract between the parties.

[27] There could not exist two conflicting positions in respect of the H respondent's contractual interest in the same subject, the land. The land featured in the FLA merely as a 'security' for the due repayment of a loan. The obligations of the appellants under the terms in the FLA were *in personam* in nature; the land offered to the respondent was to form only a guarantee for the repayment of the friendly loan. This was obvious from a I plain and natural reading of those clauses therein set out at para. 5(b) above.

[28] On the other hand if the SPA was to be treated as an independent and separate contract, it had the effect of creating *in rem* rights over the land outright in favour of the respondent, that is, divesting the appellants' title and interest in the land completely, subject of course to the respondent satisfying the terms of the SPA. A

[29] It mattered therefore that the court should have at the outset dealt with and determined which of the two documents, namely the FLA or the SPA, reflected the dominant or prevalent contract that had been entered into and was binding upon the parties. B

[30] It was trite that where there were divergent positions taken and and/or interpretations asserted by the respective parties, the court was entitled to rely on the contents of contemporaneous documents to resolve such inconsistencies. The veracity of the rival positions asserted called to be tested against what had been expressed and reduced into writing contemporaneously by either or both parties. C

[31] Having reviewed the testimony of the respective witnesses on record and, more importantly, having considered the contents of several inter-related and relevant documents, we were of the unanimous view that the FLA was the primary contract between the parties. The nature of the contract that was entered into was essentially a loan transaction, wherein the respondent was the lender, and the appellants were the borrower. Under the agreed terms of the FLA the land, belonging to the appellants, was most definitely intended only to be a security for the due repayment of the loan sum taken by the appellants. D E

[32] It should be noted that the FLA itself did not require that an MOT should be signed or the IDT be handed over by the appellants. It followed then, in our assessment, that the deposit of the IDT of the land by the appellants with the solicitors for the respondent in this case was more in the nature of an additional comfort to enable the respondent at that stage to merely have a temporary lien (somewhat similar to a right in equity) over the IDT (not over the land *per se*) pending repayment of the loan by the appellants. F G

[33] We were fortified in coming to the above conclusion for the following reasons:

(a) It was conceded by the respondent (and also his solicitor) that there had been a similar previous loan transaction between the appellants as borrower and the respondent as lender, wherein similarly another piece of land (also belonging to the appellants) had been pledged as security for the repayment of the loan. H

(b) With reference to the 'Acknowledgment Receipt' (P12) it was pertinent to note that the alleged payment in cash of RM44,700 (stated to constitute the balance of purchase price) was seemingly also effected on I

A 10 May 2012, the same date the SPA was executed; the receipt of this sum in cash was disputed by the appellants. Firstly, the SPA provided for, (as earlier pointed out in THE SECOND SCHEDULE) that the balance of purchase price was to be RM40,000 (not RM44,700). Secondly, the SPA provided that the respondent had twelve (12) months
B from date of its execution to pay the balance of purchase price and complete the purchase; but notwithstanding that, it was the claim of the respondent that the full purchase price had been paid on the very same day the SPA was executed. There was therefore cause to suspect whether the alleged cash payment did indeed take place at all.

C (c) The inconsistencies in the amount referred (RM40,000 vs RM44,700) remained unexplained. No further evidence was forthcoming from the respondent to show that he in fact stood possessed at that time of a sum of RM44,700 (by possible evidence from bank records) and this had indeed been passed in cash (a large sum in any event) to the appellants
D as alleged on that same day itself. Further, if indeed the full purchase price for the land had been paid on 10 May 2012, it would not have been necessary at all to provide a deadline for the so called balance of purchase price as found in s. 3.02 (a) and (b) of SPA read with Section III of THE SECOND SCHEDULE.

E (d) The stated 'deposit' sum of RM60,000, it would be appreciated, tallied with the friendly loan sum extended on same day under the FLA to the appellants. This could not have been a mere coincidence. In any event, it was curious why such a large sum (60% of the purchase price) constituted the deposit in this sale and purchase transaction for a piece
F of land when the normal rate for deposit in similar situations was only 10% of the total purchase consideration.

(e) The first appellant's (SP2) evidence in respect of surrounding circumstances related to the executed 'Acknowledgment Receipt' (P12) was more plausible, and definitely not inherently improbable, on the
G totality of the evidence. It was SP2's testimony that the amount of RM55,300 received by way of cheques was the balance of the loan of RM60,000 received after deduction by the respondent. That sum was derived after a total deduction of RM4,700 which was made in advance by the respondent, being RM3,000 representing the agreed 5% interest
H on the loan amount for the first month, and a further sum of RM1,700 for settlement of legal fees payable to Tetuan Zaira & Co.

(f) The respondent also admitted receiving four payments of RM3,000 each and this was consistent with the appellant's version that interest was charged by the respondent on the loan sum at the rate of 5% per month
I (on RM60,000); there was therefore sufficient basis on the facts to infer that this was a term in the collateral contract between the parties, as asserted by the appellants.

(g) As earlier highlighted, it was noteworthy that the two letters of demand of 29 March 2013 and 26 April 2013 (P8, P9) adverted to and demanded of the appellant to 'menyelesaikan bayaran ansuran yang tertunggak'. As noted by the learned judge, there was no provision in the FLA to repayment by instalments save that repayment was to be made within twelve months. In our assessment 'bayaran ansuran yang tertunggak' adverted to in those letters could only refer to the interest payments that were due and payable monthly on the loan by the appellants as maintained by SP2 in his testimony.

[34] It was also the appellants' case (see pleadings and also submission of counsel) that the SPA in the factual matrix surrounding this case had contravened s. 24 (What considerations and objects are lawful and what not) and also s. 75 of the Contracts Act 1950; the latter in pursuance of the argument that the SPA was a stipulation by way of a 'penalty' for the loan. The learned judge appeared not to have directed the court's mind to these legal issued raised.

[35] It was our conclusion therefore based on the totality of evidence that was before the court that the learned Judge had misdirected himself when he proceeded on the basis that the FLA and SPA existed side by side with equal force. We were convinced that the dominant and principal operative contractual relationship that was existent between the parties was as evidenced by the terms of the FLA, with the further collateral term that the appellants pay interest on the loan sum at the rate of 5% per month which was to be payable every month until the full friendly loan sum of RM60,000 was repaid to the respondent within 12 months.

[36] The execution of the SPA and the MOT (the latter irrespective of whether it was done in blank or otherwise) together with the deposit of the IDT with the respondent's solicitors were, in our considered view, merely ancillary to the FLA and intended to reinforce the appellants' agreement with the respondent that the land was to be held as a security for the due and full repayment of the friendly loan. The respondent was only entitled to an equitable lien over the IDT and/or equitable claim over the land in the meanwhile. The respondent was not entitled to use those documents to register separately and independently a transfer of the land to himself.

[37] What legal effect should then be attached to the voluntary deposit of the IDT by the appellants with the respondent and described in the FLA as a 'security' for the loan? It was also provided in the FLA that the land would be transferred to the respondent if there was a default in the repayment of the loan.

[38] Under the Torrens system, accepted as governing land matters in our country, as embodied in the provisions of the NLC a proper security over any land became only perfected when a charge was formally presented and registered with the relevant authorities in respect of that land (s. 241 NLC).

A Only then would the creditor be considered as a secured creditor (in contrast to unsecured creditors). The enforcement or realisation of the charge by such secured creditor was further circumscribed by strict provisions in the NLC (ss. 253 to 269 NLC) that had to be strictly complied with.

[39] The mere holding of the issue document of title by a lender did not B therefore vest in the holder any legally recognised interest in the land, much less, any right to deal with the land or to transfer it to himself on the grounds that it was intended to be a security for the loan; the lender remained always an unsecured creditor. It was also trite that only a secured creditor with a registered charge in respect of a specific land had priority in the proceeds C from the sale of the land upon default of the loan; an unsecured creditor remained ranked equal with other unsecured creditors for satisfaction of their respective claims, if at all.

[40] The law however did not leave a lender with whom an issue document of title had been deposited, ostensibly for purposes of 'security' for the loan, D bereft of any recognition or a remedy. The NLC provided for a statutory lien that could be created in such circumstances in favour of such a lender and this rather hybrid security had been termed in law as a lien-holders' caveat. Section 281 of the NLC provided for the creation and the effect of such lien-holders' caveats while ss. 330 and 331 spelt out requirements related to its E registration and its period of validity.

[41] Section 281 of NLC was in the following terms:

Creation, and effect, of liens

281(1) Any proprietor of lessee for the time being may deposit with any F other person or body, as security for a loan, his issue document of title or, as the case may be, duplicate lease; and that person or body:

(a) may thereupon apply under Chapter 1 of Part Nineteen for the entry of a lien-holder's caveat; and

(b) shall upon the entry of such a caveat, become entitled to a lien over G the land or lease.

(2) Where the holder of any lien has obtained judgment for the amount due to him thereunder, he shall be entitled to apply to the Court for, and obtain forthwith, an order for the sale of the land or lease.

(3) Any such application shall be made in accordance with any law for H the time being in force relating to civil procedure; and the provisions of sections 257 to 259 and sections 266 to 269 shall apply, mutatis mutandis, where any such application has been made as they apply where a chargee applies for an order under section 256.

(4) ….

I (5) …

(6) …

[42] The NLC therefore recognised that an issue document of title may be retained by a lender to be used to ultimately recover monies that were unpaid on a loan. Case authorities in this area have repeatedly held that the deposit of the document of title must be done by the proprietor of the land in question and none other. Further it has also been affirmed in numerous cases too that there was no time restriction or deadline imposed for the registration by the lender of the lien-holders caveat over the land.

[43] What was however of paramount significance in those provisions, in so far as the issues in this instant appeal were concerned, was the statutorily stipulated requirements or processes related to how that inchoate 'security' could be enforced (or realised) by the lender to recover monies unpaid under the loan. Those provisions were in mandatory terms. It was incumbent upon the lender to firstly register a lien-holders' caveat under the NLC. The lender then had to prove the debt by obtaining a judgment (s. 281(2) NLC). Only thereafter was the lender entitled to seek an order for sale of the subject property complying with the same provisions that was applicable as would be in the case of a registered charge under the NLC (ss. 253 to 269 NLC) and O. 42 of the Rules of Court 2012.

[44] The rationale for such safeguards was obvious. To put it simply it was never the intention of the borrower to divest or dispose of his whole interest in the land. What was being created in favour of the holder of any such issue document of title (the lender) was only a limited right to seek recovery from the value of the land in the event of a default of the loan. The terms to be set out in the order for sale and the consequent public auction (usually) ensured that the lender only recovered what was outstanding and due, with any excess of proceeds derived from such forced disposal reverting to the registered owner of the land.

[45] Clearly therefore the deposit of the document of title or even a registered lien-holders' caveat for that matter did not vest the lender with a 'proprietary right' in the land. More importantly, it could not elevate the lender to the status of a *bona fide* purchaser in the land by use of, as in this case, an executed MOT, in any event.

[46] In this regard, the following comments of Raja Azlan Shah J (as His Royal Highness then was) in *Mercantile Bank Ltd v. The Official Assignee of the Property of How Han Teh* [1969] 1 LNS 106; [1969] 2 MLJ 196 when dealing with an equivalent provision in the previous Land Code (Cap. 138) were pertinent:

> … although no lien is created under the Land Code until the caveat is registered, the court in the absence of express words in the statute is not preventing 'from doing justice between the parties by giving effect to equitable rights by way of contract'. In other words, although failure to lodge a caveat does not entitle the depositee with whom the issue document is deposited, to a lien under the Code, he still possess a right to it in equity. He can exercise that right by registering the caveat under section 134 at any time.

[47] It was also instructive on this issue to also consider the view advanced by Yong Chiu Mei in an article published in The Law Review 2007 (p. 579) titled "*The Concept and Nature of Liens and the Legal Effect of Imperfect Liens under the Peninsular Malaysian Land Law*" where she said that:

> Thus far it appears that there has not been any reported case which deals with an application for sale by an un-caveated lien-holder for sale under the National Land Code. It is suggested that, so long as a lien-holder's caveat is still to be entered so as to create a lien over land, the lender is not entitled to the remedy of sale under the National Land Code. His only option would seem to be to attach and sell the land as an unsecured creditor. This would further support the suggestion that what is recognised and protected by the court in equity in the "right" to create a statutory lien over the land, rather than an equitable version of a statutory lien …

(See also the observations of Natha Balan JC (as he then was), *albeit obiter*, in *Consolidated Credit Company Sdn Bhd v. Gladys Loh & Ors and Another Case* [2014] 6 CLJ 308 at p. 369)

[48] It was our considered view therefore that the deposit of the IDT in this case by the appellants with the respondent (or his solicitor) only created an 'equitable' interest, which, to be enforced or realised required the respondent to register with the land authorities a lien-holders caveat under the provision of the NLC over the land. The respondent had to then obtain a judgment as to the amount owed by the appellants before securing an order for sale from the courts to enforce or recover monies under the lien-holders' caveat. The respondent could not just transfer the total interest in the land to himself disregarding wholly the appellants' countervailing equitable rights to any excess proceeds derived from an auction of the land. As alluded to even by the learned judge himself, the respondent could not unjustly enrich himself with the benefit of the whole of the land. The court, in our view, had rightly taken judicial notice that the present market value of the land far exceeded the unpaid portion of the friendly loan amount.

[49] For completeness we should also state that the learned judge was clearly in error when His Lordship appeared to have been persuaded that the acknowledgment receipt (P12) was sufficient proof that the loan had been subsequently agreed to be increased from RM60,000 to RM100,000. What seems to have been overlooked was that on the face of the document itself the alleged RM100,000 only related, and if at all relevant, to the SPA and the purchase consideration thereto. There was no reference to the friendly loan in that document in whatsoever manner for the learned judge to reach that finding.

[50] For the reasons elaborated and discussed above we were of the unanimous view that the learned judge had misdirected himself on the issues of fact that arose in this case. There was insufficient judicial appreciation and lack of proper analysis of the totality of the evidence led before the court.

The learned judge also failed to appreciate the legal provisions that should have been invoked in the circumstances obtaining in this case. The findings and conclusion of the learned judge, in our respectful view, was therefore plainly wrong and unsustainable. (*China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal* [1996] 3 CLJ 163; *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; *Zaharah A Kadir v. Ramunia Bauxite Pte Ltd & Anor* [2011] 1 LNS 1015; [2012] 1 AMR 209).

[51] This was a case that warranted our appellate intervention to right a wrong that had been occasioned to the appellants. We granted the orders as set out in para. 2 above which, as it will be noted, apart from reverting the land in effect to the appellants also ensured that the respondent recovered from the appellants the unpaid balance of the friendly loan amounting to RM48,000 only.